No. 06-484

IN THE

Supreme Court of the United States

TELLABS, INCORPORATED and RICHARD C. NOTEBAERT,
Petitioners,

v.

MAKOR ISSUES & RIGHTS, LTD., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE NEW YORK STATE COMMON RETIREMENT FUND, THE CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM, THE STATE OF WISCONSIN INVESTMENT BOARD, THE LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION, THE TEACHERS' RETIREMENT SYSTEM OF LOUISIANA, THE ARKANSAS TEACHER RETIREMENT SYSTEM, THE SACRAMENTO COUNTY EMPLOYEES' RETIREMENT SYSTEM, THE GOVERNMENT OF GUAM RETIREMENT FUND, THE LOUISIANA SHERIFFS PENSION & RELIEF FUND, THE JACKSONVILLE POLICE AND FIRE PENSION FUND AND THE ANCHORAGE POLICE AND FIRE RETIREMENT SYSTEM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 550,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Northern California is one of its regional affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in numerous cases addressing the proper scope of the Fourth Amendment.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a non-profit organization based in New York City. AALDEF defends the civil rights of Asian Americans nationwide through the prosecution of lawsuits, legal advocacy and dissemination of public information. AALDEF has throughout its long history defended and protected the civil liberties of Asian Americans and other minorities. The decision below creates the real possibility that police who stop and search vehicles on the basis of racial profiles will be able to circumvent the protections of the Fourth Amendment.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

minority groups; the elimination of racial prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of racial and ethnic bias. As part of that mission, the NAACP has vigorously opposed the use of racial profiling by law enforcement officials to target minority drivers and their passengers. *See, e.g.*, Dr. Dwight Steward & Dr. Douglas Berg, TEXAS STATE CONFERENCE OF NAACP BRANCHES RACIAL PROFILING STUDY: A STATISTICAL EXAMINATION OF RACIAL PROFILING (2000), *available at* http://www.texasnaacp.org/rp.doc. While eliminating racial profiling will require a multi-faceted effort, obtaining meaningful enforcement of the Fourth Amendment by the courts is an essential component to protecting our rights as citizens against unconstitutional stops, searches and seizures.

STATEMENT OF THE CASE

On November 27, 2001, at roughly 1:40 a.m., Sutter County Sheriff's Deputy Robert Charles Brokenbrough stopped a car being driven by Karen Simeroth. *People v. Brendlin*, 38 Cal. 4th 1107, 1111 (Cal. 2006). Earlier that evening, while in the parking lot of a Circle K market, Brokenbrough had noticed that the registration tag on the Buick was expired, but he was informed by dispatch that an application for renewal was "in process" and did not attempt to question the driver of the car or to effect a traffic stop at that time. *Id.* When he later saw the car on Franklin Road, Brokenbrough noticed a temporary operating permit on the car, consistent with the application for renewal, that did not expire until the end of the month. *Id.* He nevertheless pulled the car over for a traffic stop to see whether the temporary

operating permit affixed to the rear window matched the vehicle. *Id.*

In its brief before the California State Supreme Court, the State conceded that Brokenbrough had no reasonable articulable suspicion to stop the car, because "[a] vehicle with an application for renewal of expired registration would be expected to have a temporary operating permit." *Id.* at 1114. The traffic stop was thus unlawful. *Id.*

Bruce Brendlin was a passenger in Simeroth's car. *Id.* at 1111. After the vehicle was pulled over, both Simeroth and Brendlin were asked to identify themselves. *Id.* Because Brokenbrough recognized Brendlin and believed him to be a parolee at large, he contacted dispatch, which informed Brokenbrough that a "no bail" warrant had been issued for Brendlin's arrest. *Id.* Brokenbrough immediately ordered Brendlin out of the car at gunpoint and seized a syringe cap during a search incident to arrest. *Id.* at 1111-12. A subsequent search of the car uncovered various items related to the manufacture of methamphetamine. *Id.*

Brendlin was charged with multiple counts relating to the possession and manufacture of methamphetamine. *See* Petition for Writ of Certiorari at 4, *Brendlin v. California*, No. 06-8120 (U.S. Nov. 28, 2006). The trial court denied his motion to suppress, but the California Court of Appeal reversed, finding that, because Brendlin had been detained by the traffic stop within the meaning of the Fourth Amendment, he was entitled to have the evidence against him suppressed as the fruit of the unlawful stop. *Brendlin*, 38 Cal. 4th at 1112-13. The California Supreme Court disagreed. It held that because Brendlin was a passenger in the car and not the driver, he had not been seized by the traffic stop as a constitutional matter because he was "free to ignore the

police presence and go about his . . . business." *Id.* at 1117. Thus, even though the evidence against Brendlin would not have been uncovered but for the concededly illegal stop, and even though it was inadmissible against the driver, the court held that he was not entitled to suppression. *Id.* at 1123.

This Court granted certiorari to decide the following question: Whether a passenger in a vehicle subject to a traffic stop is thereby "detained" for purposes of the Fourth Amendment, thus allowing the passenger to contest the legality of the traffic stop. *Brendlin v. California*, 127 S. Ct. 1145 (2007).

SUMMARY OF ARGUMENT

The California Supreme Court's ruling that Brendlin was not seized by the traffic stop at issue is flawed in two pivotal ways. First, the lower court erroneously assumed that a reasonable person in Brendlin's situation would have felt free to leave the car when it was initially pulled over — a holding that defies common sense, not least because the stop had no reasonable or identifiable purpose. Second, contrary to this Court's unambiguous precedent, the California Supreme Court improperly relied upon the police officer's subjective intent in order to determine whether and when the seizure occurred.

Because Petitioner's Brief will discuss both of these issues in detail, *amici* will address them only briefly. Instead, this brief will focus upon the impact an affirmance of the lower court's ruling would have on arbitrary and illegal stops and searches based on race, *i.e.*, on the practice of racial profiling. The California Court's ruling threatens to leave

those subjected to racially suspect stops and searches without adequate and appropriate legal recourse.

It is uncontested that the stop to which Brendlin and Simeroth were subjected was unlawful; in fact, the stop was precisely the type of arbitrary and capricious exercise of police power the Fourth Amendment was intended to combat. Simeroth, the driver, has accordingly been free to seek vindication of her Fourth Amendment rights via suppression of the evidence discovered against her as a result of the unlawful stop. Brendlin, according to the California court, has no such recourse. This incongruous outcome — wherein drivers are afforded full Fourth Amendment protections but passengers none at all — results in a perverse police incentive to stop cars arbitrarily, and with impunity with respect to passengers, in the hopes of discovering evidence against a passenger that cannot be discovered by other means.

Statistical evidence of racial profiling indicates that minorities will be disproportionately affected by the ruling and the improper incentives it creates for law enforcement. Minorities throughout the United States are disproportionately stopped and searched despite the overwhelming data that shows the rates of contraband discovery and arrest are the same across racial groups. A ruling that fails to recognize the seizure of passengers even at the initiation of a traffic stop would thus make minorities doubly vulnerable — first, when they are disproportionately stopped and searched, and then again when they are left without a remedy under the Fourth Amendment even if a stop is based on race and race alone. The rule announced by the California court should be cause for concern for all passengers, who would be subjected to illegal stops without

Fourth Amendment protections, but would have particularly pernicious consequences for minority passengers.

ARGUMENT

I. THE STANDARD GOVERNING SEIZURE USED BY THE CALIFORNIA SUPREME COURT IS INCONSISTENT WITH THIS COURT'S FOURTH AMENDMENT JURISPRUDENCE.

A. Petitioner Was Seized By The Traffic Stop Because A Reasonable Person In His Circumstances Would Not Have Felt Free To Leave.

The California Supreme Court's premise that Brendlin "knew he was free to ignore the police presence and go about his business . . . even if he was unable as a practical matter to leave the scene until the car came to halt," 38 Cal. 4th at 1121, is inconsistent with the facts of this case, this Court's precedent, and realistic assessments about a reasonable passenger's perception of what he is permitted to do when subjected to a traffic stop.

According to the state supreme court, "[a]bsent some directive from the police, and as long as the rules of the road are otherwise obeyed, the passenger is free to do what the driver cannot — i.e., exit the vehicle . . . and thereby terminate the encounter with the officer." *Brendlin*, 38 Cal. 4th at 1120. Setting aside the myriad individual circumstances under which this proposition is arguably untrue — for example, when there is inclement weather, the stop is conducted late at night (as was the case here), or the stop is conducted on the side of a busy highway — it is plain that a reasonable person would ordinarily not believe that he is simply free to leave a car that has been pulled over by law

enforcement until there is some indication that this is the case.[2]

That is especially true when, as here, the stop is unsupported by any legitimate law enforcement purpose. Because Simeroth had not in fact been violating any traffic laws, neither Simeroth nor Brendlin had any reason to know why the car had been pulled over, and thus no way of knowing who or what the police were investigating. Under the circumstances, it was entirely reasonable for both to assume that they had been seized by the police and that neither was free to leave the car. The objective reasonableness of that perception was reinforced in this case when Brendlin was asked to identify himself as soon as the officer approached the car. *Brendlin*, 38 Cal. 4th at 111.[3]

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[2] This Court's decision in *Mendenhall* notes that her encounter with DEA agents at the airport might "reasonably have appeared coercive to the respondent, who was 22 years old and had not been graduated from high school. It is additionally suggested that the respondent, a female and a Negro, may have felt unusually threatened by the officers, who were white males." The Court goes on to acknowledge the relevance of those factors but concludes that the totality of the evidence in the case supported a finding of consent. *United States v. Mendenhall*, 446 U.S. 544, 558 (1980). It is difficult to imagine any conceivable traffic stop under which any reasonable passenger — much less a person of color, or a person without a college education, or a young woman pulled over by two male law enforcement officers — would feel free simply to walk away from the car without assurance from the police that doing so was acceptable.

[3] *Cf. Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 182-83 (2004) (identifying 21 states where a person may be subject to criminal penalty for refusing to identify himself to a police officer after a lawful stop).

This Court, moreover, has recently held that a passenger can be arrested based on contraband found in a stopped car, *Maryland v. Pringle*, 540 U.S. 366, 374 (2003), and that a passenger's personal effects are subject to search if there is probable cause to search the car, *Wyoming v. Houghton*, 526 U.S. 295, 307 (1999). The Court has justified these rulings on the ground that "a car passenger . . . will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or evidence of their wrongdoing." *Pringle*, 540 U.S. at 373 (quoting *Houghton*, 526 U.S. at 304-05). If the nexus of a car and its occupants is close enough to support the arrest of a passenger or search of a passenger's effects, it is surely close enough for a reasonable passenger to believe that he is not a mere bystander who is free to leave once the car is stopped.

Additionally, a reasonable passenger who knows that the officer can order him out of the car even if he does not wish to exit, *Maryland v. Wilson*, 519 U.S. 408, 410 (1997), may not only feel subject to the officer's authority, but fear the possible consequences of suddenly exiting the car without permission in the event that his attempt to leave is misconstrued by the police officer as a threat to the officer's or the public's safety.

Finally, the claim that passengers have not been seized also defies reality and common sense in another typical traffic stop scenario, when the officer approaches the car and asks for consent to search the vehicle. At that point, a reasonable passenger is likely to know that any rapid exit from the car — particularly if it is stopped in a high crime area — may itself constitute a basis for reasonable suspicion and hence further police action. *See Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). Passengers in California, like

Brendlin, have even more reason to believe this is the case. The California Court of Appeal has explicitly stated that its precedent does not "stand for the proposition that after a traffic stop, the officer must stand by while the doors of the vehicle fly open and passengers leave in all directions." *People v. Castellon*, 76 Cal. App. 4th 1369, 1376 n.2 (Cal. Ct. App. 1999).

For all these reasons, it is entirely reasonable for passengers like Brendlin to conclude that they are not initially free to leave a car that has been pulled over by law enforcement. In fact, the situation of a car passenger like Brendlin is far different from that of petitioners in *Florida v. Bostick*, 501 U.S. 429 (1991), or *I.N.S. v. Delgado*, 466 U.S. 210 (1984), whose "freedom of movement was restricted by a factor independent of police conduct." *Bostick*, 501 U.S. at 436. In *Bostick*, petitioner was on a bus about to depart on a long distance trip and so would not have felt free to leave even if the police had not boarded the bus. *Id.* at 436. Similarly, in *Delgado*, petitioners were at work during normal working hours and were thus confined by virtue of that fact. 466 U.S. at 218. In contrast, a passenger in a car that has just been pulled over cannot be said to be free to go about his business, for his business was to continue in his travels in that car; instead, he has been brought to a halt solely by police conduct.[4]

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[4] This analysis does not mean that the initial seizure of a passenger created by virtue of a traffic stop is *per se* unreasonable; when there is reasonable suspicion to effect the traffic stop, *i.e.* the stop is lawful, the initial seizure of the passenger will be just as lawful as that of the driver. How long the seizure of a passenger may continue must depend on the totality of the circumstances in each case.

This analysis comports with the common sense assumptions reasonable people have regarding their rights during a traffic stop by recognizing that passengers like Brendlin are just as seized for Fourth Amendment purposes as the driver of the stopped car. It thus also means that passengers like Brendlin who have been subjected to an unlawful stop can vindicate their Fourth Amendment right to be free from unreasonable seizure in a court of law. Should this Court disagree, and find that all passengers are indeed initially free to leave a car as soon as it has been pulled over for a traffic stop, it should announce that holding unambiguously. Absent that clear holding, reasonable passengers will continue to believe that they are not free to leave until the police indicate otherwise.

B. The Lower Court Improperly Relied On The Subjective Intent Of The Officer To Conclude That A Reasonable Passenger Would Have Felt Free To Leave.

It is well settled that "a person has been 'seized' within the meaning of the Fourth Amendment if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 554; *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988) ("This 'reasonable person' standard also ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached."). It is also clear that the seizure determination is to be made from the point of view of the person who is the object of the officer's attentions, rather than from that of the officer. *Mendenhall*, 446 U.S. at 555 n.6 ("[T]he subjective intention of the DEA agent in this case to detain the respondent, had she attempted

to leave, is irrelevant except insofar as that may have been conveyed to the respondent."); *cf. Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

Although the lower court opinion begins with an accurate recitation of the standard for determining whether a seizure has taken place, the one the court actually applied functionally eviscerates this Court's holding in *Mendenhall* by placing excessive emphasis on police officer intent. The California Supreme Court's inquiry referred throughout to the subjective intent of the police officer despite the fact that that intent was neither communicated to Brendlin nor would have been apparent to a reasonable person in his position. The court asserted, for example, that "Deputy Brokenbrough's flashing lights were directed at the driver, Karen Simeroth, and not at defendant." *Brendlin*, 38 Cal. 4th at 1118. A reasonable passenger, however, has no conceivable means of knowing at whom an officer's flashing lights are directed, particularly where, as here, there were no lawful grounds for the stop. Indeed, the lower court went so far as to state, "[w]e think it more sensible to leave it up to the officer, once cause for the vehicle stop has been established, to decide who should be seized and when." *Id.* at 1121 n.4.

The lower court's logic would place the determination of when a seizure has occurred squarely within the hands of officers themselves, who would be free to testify to their subjective intentions about whether and when a particular person was seized, regardless of whether those intentions were apparent. The protection afforded by the Fourth Amendment against unreasonable seizures becomes meaningless if police officers themselves are permitted to

provide *post hoc* determinations of whether and when a particular person had been seized — and thereby functionally to decide who is to be afforded Fourth Amendment protection.

The incentive for law enforcement officers simply to assert in all cases that the passengers at issue were not seized until after evidence was uncovered against them will be great, and perfectly lawful, if the lower court's rule is upheld. The problem raised by this possibility is precisely the reason why this Court has heretofore insisted upon an objective reasonableness standard from the point of view of the person confronted.

II. FAILING TO RECOGNIZE THAT PASSENGERS ARE SEIZED WILL PERMIT THE USE OF ARBITRARY AND DISCRIMINATORY STOPS THAT OFFEND THE CORE PRINCIPLES OF THE FOURTH AMENDMENT.

A. The Lower Court's Ruling Would Permit Arbitrary And Discriminatory Stops As To Passengers.

Although the issue before this Court is whether Brendlin was seized and not whether that seizure was in fact reasonable, the *per se* unreasonableness of the stop to which he was subjected is nevertheless relevant to this Court's inquiry.

The Fourth Amendment clearly prohibits both arbitrary and discriminatory seizures. *See, e.g., United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976) ("The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."); *United States v. Brignoni-Ponce*, 422 U.S.

873, 878 (1975). Although the reasonableness of a seizure depends upon "a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers," *id.*, there is simply no legitimate public interest in arbitrary or discriminatory stops, and they are accordingly unlawful. Such stops are not, and should not, be shielded from Fourth Amendment scrutiny.

It is axiomatic that the driver of a vehicle that was arbitrarily or discriminatorily stopped may vindicate her Fourth Amendment rights, for example, via a motion to suppress evidence that would not have been gathered but for the stop. Should this Court affirm the California court's ruling, however, any evidence gathered against passengers in the very same car will be admissible even though it too was the product of an unlawful stop. The lower court's ruling would create the incongruous situation in which the same evidence gathered from the same concededly unlawful stop, which affected both driver and passenger equally, could be used against one person in the car but not another. It would functionally permit baseless stops with respect to a whole class of people: passengers.

The California Supreme Court's ruling creates an incentive for law enforcement to take advantage of that incongruity. Because evidence uncovered as a result of an arbitrary or discriminatory stop would still be admissible against passengers, law enforcement officers will have little reason to curtail such stops. This is not an incentive structure that the Fourth Amendment was designed to tolerate; an increase in arrests and convictions may result, but at a price this Court has already repeatedly rejected. *See, e.g., Almeida-Sanchez v. United States,* 413 U.S. 266, 273 (1973) (finding a roving Border Patrol stop and search without

probable cause or reasonable suspicion unconstitutional under the Fourth Amendment); *Carroll v. United States*, 267 U.S. 132, 153-54 (1925) ("It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search.").

In *Whren*, this Court suggested that allegations of racial profiling can be addressed through an Equal Protection claim seeking damages and injunctive relief. 517 U.S. at 813. This Court did not suggest, however, that a Fourth Amendment violation and an Equal Protection violation represent the same constitutional injury, or that redress for one provides satisfactory redress for the other. Rather, the Court held in *Whren* that there had been no Fourth Amendment violation to redress because the car stop at issue there was lawful. *Id.* Here, by contrast, the car stop was concededly unlawful.

Unlike the knock-and-announce violation in *Hudson v. Michigan*, 126 S. Ct. 2159 (2006), moreover, the unlawful car stop in this case involved more than an issue of timing. The entry into Hudson's home would only have been delayed for a few seconds had the officers properly knocked and announced their presence. Brendlin, on the other hand, would never have been seized as part of the car stop if the police in this case had complied with the Fourth Amendment. The increased threat to privacy creates a correspondingly increased need for an effective deterrent against police misconduct.

Furthermore, the fact that someone else in the vehicle may bring a constitutional claim to remedy systemic deficiencies (*i.e.*, the driver), does not mean that others who

have suffered from the same Fourth Amendment violation should be unable to do so — particularly where, as here, the two parties may have wholly different legal interests.

Finally, the necessity of showing a pattern and practice of racial discrimination can be nearly insurmountable for individuals, much less a showing of actual discriminatory intent. *See, e.g.*, *Chavez v. Ill. State Police*, 251 F.3d 612 (7th Cir. 2001). There will also be individuals who do not wish to file a civil action or do not have a civil claim, but rather only seek to exclude evidence that was gathered against them perhaps as the result of a racially suspect stop and search.

B. The Lower Court Ruling And The Incentives It Would Create For Law Enforcement Would Disproportionately Affect Minorities.

The incentive the California court ruling creates for police officers to engage in arbitrary stops would, of course, affect all passengers. But the discriminatory stops and attendant searches it would newly permit with respect to passengers will have particular resonance for minority motorists. Statistical evidence tells us that minority passengers will be disproportionately affected by a ruling that bars passengers in general from challenging unlawful stops and by any increase in the number of unlawful stops that result from such a ruling. Some data indicates that minority motorists are stopped at higher rates than their white counterparts. Much more data establishes that minority motorists are disproportionately subjected to searches once they have been stopped — even though searches of minorities are not any more likely to uncover evidence of criminal wrongdoing than searches of whites. A disproportionate number of minority passengers will

accordingly be left without Fourth Amendment recourse when subjected to discriminatory stops if this Court affirms the lower court's ruling.

i. Stop Rates

There is some evidence that cars with African American occupants are more likely to be stopped, even when there is no law enforcement incentive to engage in arbitrary or discriminatory stops.[5] For example:

- *Kansas*: In a multijurisdictional report on traffic stops, the Police Foundation found that, of the seven Kansas police departments assessed, "all are targeting either Blacks or Hispanics and three of the six who were assessed for both Blacks and Hispanics are targeting both."[6]
- *Maryland*: In an official report to the State, the Maryland Justice Analysis Center found that 36% of all stops in Maryland were of African Americans. The report concluded that "the fact that 36% of all the law eligible stops involved a black driver does raise concerns given that the population in Maryland is 28% black."[7]
- *Minnesota*: A statewide survey found that all minority populations, except Asians, were stopped at a higher rate

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[5] *See generally*, David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL. F. 237, 250 (1994) (discussing evidence of racial disparity in traffic stops).

[6] JOHN C. LAMBERTH, POLICE FOUND., A MULTIJURISDICTIONAL ASSESSMENT OF TRAFFIC ENFORCEMENT AND DATA COLLECTION IN KANSAS 143 (2003), *available at* http://www.racialprofilinganalysis.neu.edu/IRJ_docs/KS_2003.pdf.

[7] MD. JUSTICE ANALYSIS CTR., REPORT TO THE STATE OF MARYLAND ON LAW ELIGIBLE TRAFFIC STOPS 8 (2004), *available at* http://www.mdle.net/traffic/2004report.pdf [hereinafter MARYLAND REPORT].

than whites. African American motorists were stopped at the highest rate — over three and a half times more often than white motorists.[8]

- *Minnesota (St. Paul)*: A 2001 study by the Institute on Race & Poverty concluded that African Americans in St. Paul, Minnesota, were stopped in disproportionately high numbers compared to their proportion of the city's adult population. Whites, who represented 73.18% of the population, accounted for only 57.67% of all stops whereas African Americans, who represented 10.22% of the population, accounted for 26.25% of all stops.[9]

- *Missouri*: The state Attorney General reported that African Americans in Missouri represent 10.6% of the adult population but 15.1% of all vehicle stops. In other words, African Americans are stopped at a rate 42% higher than expected based solely on their proportion of the adult population. African Americans were 46% more likely than whites to be stopped in 2005.[10]

There is also evidence that, despite this Court's admonitions more than 30 years ago in *Brignoni-Ponce* and *Almeida-Sanchez*, traffic stops are also being conducted on

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[8] INST. RACE & POVERTY, MINNESOTA STATEWIDE RACIAL PROFILING REPORT: ALL PARTICIPATING JURISDICTIONS 10 (2003), *available at* http://www.irpumn.org/uls/resources/projects/aggregate%20report%2092303.pdf [hereinafter MINNESOTA REPORT].

[9] INST. RACE & POVERTY, REPORT ON TRAFFIC STOP DATA COLLECTED BY THE SAINT PAUL POLICE DEPARTMENT APRIL 15 THROUGH DECEMBER 15, 2000 4-6 (2001), *available at* http://www1.umn.edu/irp/SPPD0522.pdf [hereinafter ST. PAUL REPORT]

[10] ATTORNEY GEN. OF THE STATE OF MO., MISSOURI VEHICLE STOPS 2005 ANNUAL REPORT, *available at* http://www.ago.mo.gov/racialprofiling/2005/racialprofiling2005.htm#findings [hereinafter MISSOURI REPORT].

people suspected of being Mexican in order to check their immigration status.[11]

Although other jurisdictions have not reported any racial discrepancies in their stop rates, there is good reason to believe that such discrepancies are underreported because of the use of unadjusted census data. Many stop rate studies use the proportion of minorities in the general population as a baseline in order to assess racial discrepancies. As the Police Executive Research Forum notes, however, stop rates calculated using such data do not take into account the fact that the proportion of minorities who own and use vehicles may be smaller than the proportion of that minority group in the population at large.[12] Seemingly benign stop rates may thus actually mask racially biased policing. In addition, increased police discretion to engage in unlawful stops with impunity with respect to passengers may well result in further racial discrepancies in stop rates.

ii. Search Rates

Even if the rate at which minorities and whites are stopped were identical, the evidence that race matters once a car has been stopped is striking. In a national survey published in 2006, the United States Department of Justice found that African Americans were nearly three times as

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[11] *See, e.g., Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 95 F. Supp. 2d 723, 737 (N.D. Ohio 2000); Jim Yardley, *Some Texans Say Border Patrol Singles Out Too Many Blameless Hispanics*, N.Y. TIMES, Jan. 26, 2000, at A17; Susan Sachs, *Files Suggest Profiling of Latinos Led to Immigration Raids*, N.Y. TIMES, May 1, 2001, at B1.

[12] LORIE A. FRIDELL, POLICE EXECUTIVE RESEARCH FORUM, BY THE NUMBERS: A GUIDE FOR ANALYZING RACE DATA FROM VEHICLE STOPS 75 (2004), *available at* http://www.justice.utah.gov/Research/Race/PERF%20by%20the%20Numbers.pdf.

likely and Hispanics more than twice as likely as whites to be physically searched or to have their vehicles searched when their cars were stopped.[13] For men over 25, the discrepancy was even more pronounced, with African Americans close to three and a half times more likely and Hispanics over three times more likely to be searched than whites.[14]

The statistics available for jurisdictions across the country are consistent, and unrelenting:

- *California (Sacramento)*: In a 2003 report, the University of Southern California concluded that "it is apparent that both African American and Hispanic drivers [in Sacramento] are subject to more intrusive stops than white drivers. . . . African American and Hispanic drivers are asked to exit their cars, searched, and detained for 30 minutes or longer about twice as often as white drivers." The search rates reported in the study establish discrepancies among African Americans (25.3% stopped are searched), Hispanics (22.6%), and whites (11.7%).[15]

- *California (San Diego)*: An official review of 2001 traffic stops in San Diego revealed that African Americans were disproportionately subjected to consent searches, the most

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[13] African Americans were searched 10.2% of the time, compared to 11.4% for Hispanics and 3.5% for whites. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CHARACTERISTICS OF DRIVERS STOPPED BY POLICE 2002 5 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cdsp02.pdf [hereinafter BUREAU OF JUSTICE STATISTICS].

[14] African American men over 25 were searched 13.8% of the time and Hispanics 12.9% of the time, compared to 4% of white men over 25. *Id.*

[15] HOWARD P. GREENWALK, UNIV. OF S. CAL., POLICE VEHICLE STOPS IN SACRAMENTO, CALIFORNIA 32-33 (2003), *available at* http://www.cityofsacramento.org/spdata/pdf/data_collection_report_2002.pdf [hereinafter SACRAMENTO REPORT].

discretionary form of search. African American drivers represented 16.1% of consent searches, "well above their 10.4% portion of vehicle stops." Hispanic representation in consent search rates was also disproportionate — 32.5% of consent searches compared to 27.7% of stops.[16]

- *Colorado*: Of individuals stopped by the State Patrol in 2002, Hispanic drivers comprised 15% of those stopped, but over 30% of those searched.[17]

- *Illinois*: In 2006, a state-sponsored study of the prior year's traffic stops revealed that minority motorists were more likely to be subjected to a consent search than white motorists. The survey concluded that "in spite of the fact that there are fewer consent searches [than in 2004], application of consent searches by race has become more problematic."[18]

- *Maryland*: A 2004 statewide survey of traffic stops in Maryland established that the highest rate of searches was for Hispanic males (9.9% stopped are searched) followed by African American males (7.5%), and white males (5.6%).[19]

- *Minnesota (St. Paul)*: According to data gathered by the St. Paul Police Department, after being stopped, African

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[16] DR. GARY CORDNER ET AL., VEHICLE STOPS IN SAN DIEGO: 2001 8 (2002), *available at* http://www.sandiego.gov/police/pdf/stoprpt.pdf.

[17] COLORADO STATE PATROL, 2002 TRAFFIC STOP SUMMARY 8 (2004), *available at* http://csp.state.co.us/Upload/03trafficstopdata.pdf [hereinafter COLORADO REPORT].

[18] ALEXANDER WEISS & AVIVA GRUMET-MORRIS, NORTHWESTERN UNIV. CTR. PUB. SAFETY, ILLINOIS TRAFFIC STOPS STATISTICS STUDY, 2005 ANNUAL REPORT 7 (2006), *available at* http://www.dot.state.il.us/trafficstop/2005annualreport.pdf.

[19] MARYLAND REPORT, *supra* note 7, at 9.

Americans, Hispanics and Native Americans in St. Paul, Minnesota, are subjected to pat down searches of their persons and searches of their vehicles at rates higher than the search rates for white drivers. For example, in searches that produced no contraband whatsoever, 19.6% of African Americans and 16.7% of Hispanics, but only 8.4% of whites, were patted down and had their vehicles searched.[20]

- *Missouri*: The 2005 Annual Report of the Attorney General's Office found that, across the state of Missouri, African Americans were 1.78 times more likely to be searched than whites and Hispanics 1.98 times more likely.[21]

- *Ohio (Cleveland)*: A 2006 University of Cincinnati report found that, even after controlling for other relevant factors, a driver's race has a "significant influence over whether or not searches are conducted [in Cleveland]. The odds of being searched are 1.3 times higher for Black drivers compared to Caucasian drivers." The report also found that African American motorists were more likely to be searched for discretionary reasons.[22]

- *Rhode Island*: An official review of statewide traffic stops in Rhode Island found that 2.9% of whites but 5.9% of non-whites were subject to a discretionary search upon being stopped by the police. In other words, "non-whites are significantly more likely than whites to be subjected

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[20] SAINT PAUL REPORT, *supra* note 9, at 4, 15.

[21] MISSOURI REPORT, *supra* note 10.

[22] ROBIN ENGEL ET AL., UNIV. OF CINCINNATI DIV. OF CRIMINAL JUSTICE, CLEVELAND DIVISION OF POLICE TRAFFIC STOP DATA STUDY: FINAL REPORT xiii (2006), *available at* http://www.uc.edu/criminaljustice/ProjectReports/Cleveland_Traffic_Stop_Study.pdf.

to a discretionary search. Statewide, the odds of a non-white motorists [sic] being searched are roughly twice that of a white driver being searched."[23]

- *Tennessee*: A statewide survey of traffic stops in Tennessee found that police officers searched 16.8% of Hispanics stopped, 8.1% of African Americans, and 5.8% of whites. When stopping vehicles for moving violations, officers searched 14.1% of Hispanics, 5.7% of African Americans, and 4.4% of whites. When stopping vehicles for vehicle equipment violations, officers searched 20.3% of Hispanics, 12.7% of African Americans, and 8.3% of whites.[24]

A rule that bars passengers from challenging the unlawfulness of a stop (and the admissibility of the fruits of that stop) would disproportionately affect minorities because minority motorists are disproportionately searched. While the rule announced by the California high court has troubling implications for all passengers — particularly given the incentive it provides to law enforcement to increase the number of unreasonable stops in the hopes of gathering otherwise inadmissible evidence — minorities will be particularly affected given the reality of disproportionate search rates.

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[23] AMY FARRELL & JACK MCDEVITT, INST. RACE & JUSTICE, RHODE ISLAND TRAFFIC STOP STATISTICS 2004-2005 FINAL REPORT 2 (2006), *available at* http://www.rijustice.ri.gov/sac/Executive%20Summary%202004-2005.pdf [hereinafter RHODE ISLAND REPORT].

[24] COMPTROLLER OF THE TN TREASURY, VEHICLE STOPS AND RACE: A STUDY AND RESPONSE TO PUBLIC CHAPTER 910 OF 2000 15-16 (2002), *available at* http://www.comptroller.state.tn.us/orea/reports/racialprofiling.pdf [hereinafter TENNESSEE REPORT].

iii. Hit Rates

Such an outcome might be justified by law enforcement if the widespread disparity in search rates between different racial groups reflected the rates at which those populations violate the law. Studies over the last several years, however, have consistently found *no difference in contraband discovery rate across race* — clear cut proof that racial profiling not only offends core constitutional principles, but is also an ineffective law enforcement strategy. The DOJ, for example, recently concluded that despite the differences in search rates across race, "no measurable differences were found in the likelihood of arrest among white, black, and Hispanic male drivers."[25] Again, this pattern is consistently repeated throughout the United States:

- *California (Sacramento)*: Despite finding variation among search rates across race, a University of Southern California study of traffic stops in Sacramento, California, established that contraband is found at similar rates across race, with African Americans (22.4%) having the lowest rate compared to Hispanics (27.9%) and whites (26.4%).[26]

- *Colorado*: In 2002, whites were more likely to have a seizure of contraband or property during traffic stops when compared to the number of searches that took place. Meanwhile, Hispanics were the *least* likely group to have contraband or property seized during a traffic stop, despite being the group *most* likely to be searched.[27]

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25 BUREAU OF JUSTICE STATISTICS, *supra* note 13, at 6.

26 SACRAMENTO REPORT, *supra* note 15, at 8, 34.

27 COLORADO REPORT, *supra* note 17, at 14.

- *Maryland*: Despite disproportionate search rates involving motorists of color in this state, nothing is seized in 84% of searches of African Americans, 89% of searches of Hispanics, and 83% of whites. There also does not appear to be any meaningful difference in the number of arrests subsequent to stops for blacks and whites.[28]

- *Minnesota*: While 12.61% of African American motorists who were stopped were searched compared to 3.14% of white motorists, contraband was discovered at a rate of 11.17% for African Americans and 23.53% for whites. Similarly, Latinos accounted for 8.55% of searches, but only 9.08% of contraband hits — far below the contraband hit rate for white motorists.[29]

- *Minnesota (St. Paul)*: African Americans, Hispanics and Native Americans were far more likely than whites to be subject to pat down searches and vehicle searches in which no contraband was found. No contraband was found in 19.6% of searches involving African Americans, 16.7% of Hispanics, 16.6% of Native Americans, and 8.4% of whites.[30]

- *Missouri*: In 2005, the contraband hit rate for whites was 23.6%, compared with 18.6% of African Americans and 14.5% for Hispanics. The Attorney General's Office concluded that "this means that on average, searches of African Americans and Hispanics are less likely than searches of whites to produce contraband."[31]

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28 MARYLAND REPORT, *supra* note 7, at 10-11.

29 MINNESOTA REPORT, *supra* note 8, at 22.

30 SAINT PAUL REPORT, *supra* note 9, at 15.

31 MISSOURI REPORT, *supra* note 10.

- *Rhode Island*: White contraband rates in this state are 26.5%, and non-white rates are 22.3%.[32]

- *Tennessee*: As a result of searches in Tennessee, officers seized evidence from 1.8% of Hispanics, 1.6% of African Americans, and 1.2% of whites.[33]

This data establishes that there is no law enforcement rationale to which this Court should defer in considering the racial profiling implications of this case. This Court should not affirm a rule that would leave minorities, who are subjected to disproportionate search rates but do not disproportionately offend, without any Fourth Amendment protections to challenge flatly discriminatory stops and searches.

The Fourth Amendment currently provides an avenue of redress for those subjected to discriminatory stops and searches, whether via a suppression motion or a civil claim challenging racial profiling practices.[34] And, as this Court

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[32] RHODE ISLAND REPORT, *supra* note 23, at 3.

[33] TENNESSEE REPORT, *supra* note 24, at 18.

[34] A number of suits contesting racial profiling practices have resulted in consent decrees or judicial orders that require police departments to collect relevant data, implement officer training programs, and prohibit officers from pulling motorists over on the basis of race or skin color. *See, e.g., Wilkins v. Md. State Police*, No. 93-468 (D. Md. 2003), *available at* http://www.mdsp.org/downloads/consent_decree.pdf; *Arnold v. Ariz. Dep't of Pub. Safety*, No. 01-01463 (D. Ariz. 2006), *available at* http://www.azdps.gov/SettlementAgreement.pdf; *Rodriguez v. Cal. Highway Patrol et al.*, 89 F. Supp. 2d 1131 (N.D. Cal 2000); *Martinez v. Mount Prospect*, 92 F. Supp. 2d 780 (N.D. Ill. 2000); *United States v. New Jersey*, No.99-5970 (D.N.J 1999), *available at* http://www.usdoj.gov/crt/split/documents/jerseysa.htm. Moreover, courts have consistently approved of the use of the Fourth Amendment to redress allegations of racial profiling. *See, e.g., Md. State Conference of*

has recognized, these court actions can have particular bite when they are coupled with a § 1983 claim. *See, e.g.*, *Hudson v. Michigan*, 126 S. Ct. at 2167-68 ("As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts."). A ruling that forecloses a legal remedy under the Fourth Amendment for passengers would gut the primary deterrent to such behavior.

It would be unfortunate if after the great strides the lower courts in this country have made to combat racial profiling via the judicial system — and the great strides the states have made to combat racial profiling via increased data collection and reporting — this Court were inadvertently to re-open a door that should properly be closed.

NAACP Branches, et al. v. Md. Dep't of State Police, 72 F. Supp. 2d 560 (D. Md. 1999).

CONCLUSION

For the reasons stated above, the judgment of the California Supreme Court should be reversed.

Respectfully submitted,

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